



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[FHWA Docket No. FHWA-2018-0009]

Surface Transportation Project Delivery Program; Ohio Department of Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; Request for comment.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the second audit report for the Ohio Department of Transportation (ODOT).

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION].

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590. You may also

submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically.

Anyone can search the electronic form of all comments in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Mr. James G. Gavin, Office of Project Development and Environmental Review, (202) 366-1473, James.Gavin@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, david.sett@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 61 Forsyth Street 17T100, Atlanta, GA 30303. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C.) 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of the FHWA. The ODOT published its application for assumption under the NEPA Assignment Program on April 12, 2015, and made it available for public comment for 30 days. After considering public comments, ODOT submitted its application to FHWA on May 27, 2015. The application served as the basis for developing the memorandum of understanding (MOU) that identifies the responsibilities and obligations that ODOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on October 15, 2015, at 80 FR 62153, with a 30-day comment period to solicit the views of the public and Federal agencies. After the comment period closed, FHWA and ODOT considered comments and executed the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The results of each audit must be made available for public comment. The first audit report of ODOT compliance was finalized on July 7, 2017. This notice announces the availability of the second audit report for ODOT and solicits public comment on same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59;
23 U.S.C. 327; 23 CFR 773

Issued on: April 11, 2018.

Brandye L. Hendrickson,
Acting Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
Draft FHWA Audit of the Ohio Department of Transportation
August 6, 2016 to August 4, 2017**

Executive Summary

This is the second audit of the Ohio Department of Transportation's (ODOT) assumption of National Environmental Policy Act (NEPA) responsibilities, conducted by a team of Federal Highway Administration (FHWA) staff (the team). The ODOT made the effective date of the project-level NEPA and environmental review responsibilities it assumed from FHWA on December 28, 2015, as specified in a memorandum of understanding (MOU) signed on December 11, 2015. The ODOT delegated these responsibilities to ODOT representatives located in the Division of Planning. This audit examined ODOT's performance under the MOU regarding responsibilities and obligations assigned therein.

Prior to the on-site visit, the team performed reviews of ODOT's project NEPA approval documentation in EnviroNet (ODOT's official environmental document filing system). This review consisted of a statistically valid sample of 92 project files out of 736 approved documents in ODOT's EnviroNet system with an environmental approval date between May 31, 2016, and March 31, 2017. The team also reviewed ODOT's response to the pre-audit information request (PAIR) and ODOT's Self-Assessment report. In addition, the team reviewed ODOT's environmental processes, manuals, and guidance; ODOT NEPA Quality Assurance and Quality Control (QA/QC) Processes and Procedures; and the ODOT NEPA Assignment Training Plan (collectively, "ODOT procedures"). The team conducted on-site interviews with ODOT's Central Office and during the on-site portion of the review from July 31 to August 4, 2017. The team interviewed the resource agencies the week prior to the on-site review.

Overall, the team finds ODOT continues to make reasonable progress in implementing the NEPA Assignment Program. The team found one non-compliance observation that will require ODOT to respond with corrective action by its next self-assessment and subsequent report. The team also noted five (5) general observations and three (3) successful practices.

Background

The Surface Transportation Project Delivery Program (NEPA Assignment Program) allows a State to assume FHWA's responsibilities for review, consultation, and compliance with environmental laws for Federal-aid highway projects. When a State assumes these responsibilities, it becomes solely responsible and liable for carrying out the responsibilities assumed, in lieu of FHWA.

The State of Ohio represented by ODOT completed the application process and entered into an MOU with FHWA on December 28, 2015. With this agreement, ODOT assumed

FHWA's project approval responsibilities under NEPA and NEPA-related Federal environmental laws.

The FHWA is obligated to conduct four annual compliance audits of the ODOT's compliance with the provisions of the MOU. Audits serve as FHWA's primary mechanism of overseeing ODOT's compliance with applicable Federal laws and policies, evaluate ODOT's progress toward achieving the performance measures identified in the MOU, and collect information needed for the Secretary's annual report to Congress.

The team provided a draft of this report to ODOT for its review and the team considered its comments in preparing this draft, which will be available for public review and comment. The FHWA will consider any public comments on this draft in finalizing the report.

Scope and Methodology

The team conducted a careful examination of the ODOT NEPA Assignment Program through a review of ODOT procedures and project documentation, ODOT's PAIR response, and the self-assessment summary report, as well as interviews with ODOT Central Office and district environmental staff and resource agency staff. This review focuses on the following six NEPA Assignment Program elements: 1) program management, 2) documentation and records management, 3) (QA/QC, 4) legal sufficiency, 5) performance measurement, and 6) training.

The PAIR consisted of 22 questions, based on responsibilities assigned to ODOT in the MOU. The team reviewed ODOT's response, and compared the responses to ODOT's written procedures. The team utilized ODOT's responses to draft interview questions to clarify information in ODOT's PAIR response.

The ODOT provided its NEPA Assignment Self-Assessment summary report 30 days prior to the team's on-site review. The team considered this summary report both in focusing on issues during the project file reviews and in drafting interview questions. The report was compared against the previous year self-assessment report and the requirements in the MOU to identify any trends.

Between April 21 and June 5, 2017, the Review Team conducted a project file review of a statistically valid sample of 92 project files representing ODOT NEPA project approvals in ODOT's online environmental file system, EnviroNet with an environmental approval date between May 31, 2016 and March 31, 2017. The sample size of 92 projects was calculated using a 90 percent confidence interval with a 10 percent margin of error. The projects reviewed represented all NEPA classes of action available, all 12 ODOT Districts and the Ohio Rail Development Commission (ORDC).

During the on-site review week, the team conducted interviews with 37 ODOT staff members at the central office and three districts: District 1 (Lima); District 11 (New Philadelphia); and District 12 (Cleveland). Interviewees included District Environmental

Coordinators (DEC), environmental staff, and executive management, representing a diverse range of expertise and experience. The interviews at the ODOT Districts included a discussion with staff regarding NEPA Assignment.

The team conducted interviews the week prior to the on-site review with personnel from the Ohio Environmental Protection Agency Division of Air Pollution Control, U. S. Environmental Protection Agency (EPA) Region V Office, and the Ohio Historic Preservation Office. These agencies provided valuable insight to the Review Team regarding ODOT's performance and relationships with partner resource agencies.

The team identified gaps between the information from the desktop review of ODOT procedures, PAIR, self-assessment, project file review, and interviews. The team documented the results of its reviews and interviews and consolidated the results into related topics or themes. From these topics or themes, the team developed the review observations and successful practices. The audit results are described below.

Overall, the team found evidence that ODOT made reasonable progress in implementing the NEPA Assignment Program based on the Audit 1 observations and demonstrated commitment to success of the program. The team found one non-compliance observation that will require ODOT to respond with corrective action by its next self-assessment and subsequent report. The team also noted five (5) general observations and three (3) successful practices.

The FHWA expects ODOT to develop and implement timely corrective action to address the non-compliance observation. In addition, based on the observations noted below, the team urges ODOT to consider improvements in order to build upon the early successes of its program.

Observations and Successful Practices

Program Management

Observation 1: Implementation of ODOT policy, manuals, procedures, and guidance is inconsistent across the State, particularly involving local governments and consultants.

The Review Team noted inconsistencies in the application of various ODOT procedures in project file reviews. These inconsistencies were particularly apparent in documents produced and actions taken by Local Public Agencies (LPA) and consultants, likely due to variability in these outside parties' understanding of ODOT procedures and requirements in areas such as public involvement (PI) and environmental justice (EJ). Inconsistencies included items such as not initiating contact with emergency and public services as part of PI during the NEPA process and a failure to include EJ forms in project files.

The ODOT representatives reported in response to interviews that they have already taken action to train LPA and consultant staff in response to this observation. The ODOT staff said that they moved registration for the environmental training program from their office to the Office of Local Technical Assistance Program (LTAP) and the result was greater visibility and exposure of environmental training opportunities for the LPAs. The ODOT representatives are hopeful the additional focus on training will mitigate any inconsistencies in their program.

Successful Practice 1: ODOT has effective program management processes in place resulting in successful project delivery.

In the 2 years since ODOT has assumed NEPA responsibilities, ODOT has approved more than 1000 NEPA actions. Since Audit 1, ODOT undertook measures to solidify its program management approach. The ODOT representatives assigned subject matter experts with responsibility for ODOT's procedures in their subject areas providing a sense of ownership and allowing for ODOT to stay current in its program management responsibilities. The ODOT developed and implemented over 140 procedures to document how to implement NEPA Assignment, manage the program and provide detailed instruction for completion of environmental actions to document preparers and reviewers. The ODOT implemented a quarterly update system for new or revised ODOT procedures using a listserv approach and a single Web-based repository of all guidance to share information. The ODOT continues to use routine statewide NEPA chats and DEC Meetings to share updated information with NEPA practitioners and to hear concerns from the field. Lastly, ODOT is committed to continued process improvements to refine areas of noted deficiency.

Documentation and Records Management

Non-Compliance Observation 1: Disclosure language required by Sections 3.1.2 or 3.1.3 of the MOU was missing from project materials and documents.

The team identified 10 project files where PI materials lacked the required disclosure language required in MOU Sections 3.1.2 or 3.1.3. The disclosure in both sections states, *"The environmental review, consultation, and other actions required by applicable federal environmental laws for this project are being, or have been, carried-out by ODOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 11, 2015 and executed by FHWA and ODOT."* In addition to these 10 projects, ODOT identified 9 additional projects in which various other documents lacked the required disclosure language, as part of its self-assessment.

The projects identified by FHWA came from 8 of ODOT's 12 districts and included both ODOT and LPA projects. The projects identified by ODOT have a similar distribution among districts and project sponsors. The team considers this problem to be systemic across Ohio, identified in about 20 percent of the FHWA sample.

The team acknowledges that ODOT has already developed an action plan to address this issue, including the following:

- *In support of NEPA Assignment, ODOT has issued over 140 pieces of guidance, manuals or instructions on ODOT's process and implementation of the NEPA Assignment Program. The ODOT will review guidance that references this section of the MOU and ensure that there are no changes that we could make to better provide direction or guidance to our teams on how to comply with this requirement.*
- *The MOU Section 3.1.3 requirement is already a part of several of ODOT environmental training classes, including the PI class, Categorical Exclusion (CE) class, 1-Week NEPA class, among others. However, ODOT will review these classes to ensure Section 3.1.3 requirements are included and seek to include this compliance area into other classes.*
- *In addition, ODOT will make this area a renewed focus at our NEPA chats and DEC meetings. Both of these events are training events with all of ODOT's environmental staff, statewide. In addition, this topic will be presented to our consultant teams at our next Consultant Environmental Update Meeting and our Ohio Transportation Engineering Conference). Lastly, ODOT will look for opportunities to increase outreach to our LPA's on this subject. The ODOT will keep working to improve our overall performance in this area.*

Observation 2: Project-level compliance issues were identified in four areas: Public Involvement, Environmental Justice, Environmental Commitments, and Fiscal Constraint. In addition, instances were identified where the information included in the online environmental file did not comply with ODOT standards.

The FHWA identified project-level compliance issues on 17 projects in 4 areas in Audit 2. Three areas were identified in both Audit 1 and Audit 2 (i.e., PI, EJ, and environmental commitments) and one was a new area of issue in the current audit (i.e., fiscal constraint). Three of the areas in need of improvement from the FHWA Audit 1 (i.e., floodplains, Wetlands Findings per E.O. 11990, and Section 4(f)) were not identified in this audit, as shown in Table 1. As a result of the first FHWA audit and ODOT's first self-assessment, ODOT updated many procedures relating to the NEPA process and NEPA Assignment to improve its processes and meet Federal requirements. This may be a contributing factor to the changes in the areas in need of improvement identified in FHWA Audit 1 and FHWA Audit 2

The ODOT's second Self-Assessment summary report also identified PI, EJ, and environmental commitments as areas of needed improvements and fiscal constraint as a compliance issue. During Audit 2, ODOT informed FHWA about planned changes and improvements to EnviroNet that should address some of the errors identified in the FHWA project file review.

Table 1. Areas with Project-Level Compliance Issues by Year

Area	FHWA Audit 1 (2016)	FHWA Audit 2 (2017)
Public Involvement	✓	✓
Environmental Justice	✓	✓
Environmental Commitments	✓	✓
Fiscal Constraint		✓
Floodplains	✓	
Wetlands Findings per E.O. 11990	✓	
Section 4(f)	✓	

In addition, FHWA identified issues with project file management in both Audit 1 and Audit 2. The ODOT also identified project file management as an area in need of improvement through its Self-Assessment summary reports. For example, the team could not find required documentation in the Project File Tab even though there were indications that a related task was completed. The areas under which the errors occurred, include, but are not limited to PI, EJ, environmental commitments, maintenance of traffic, and fiscal constraint. The projects identified represent all ODOT's 12 districts and included ODOT, ORDC, and LPA projects.

The team considers these to be project level compliance issues because, although documentation expected to be in the project file was missing, the files generally contained indications that the necessary review or commitments were being implemented. The team strongly encourages ODOT to continue improvements to EnviroNet and ODOT procedures to ensure complete documentation and compliance on future projects. The FHWA will more closely review these project level compliance issues in its next Audit review.

Quality Assurance/Quality Control (QA/QC)

Observation 3: There are variations in awareness, understanding, and implementation of QA/QC process and procedures.

The inconsistencies and missing information so far described are an indication that ODOT's QA/QC process requires attention. The interviews revealed that middle and upper management at the districts are not involved in the QA/QC process. The ODOT District environmental staff and non-environmental staff said that they rely on the ODOT Central Office to be the final backstop for QA/QC. However, most district staff indicated a lack of awareness or understanding of the overall QA/QC process. No training is provided exclusively for QA/QC.

Successful Practice 2: EnviroNet serves as QA/QC in terms of process and consistency.

Interviews with district and ODOT Central Office staff indicated that, overall, EnviroNet has changed the NEPA review process for the better and represents a "one-stop shop" for

documentation of the NEPA process. The ODOT staff indicated that with everything now on-line, including electronic signatures, communication is easier between ODOT, the LPAs and consultants. The use of drop down menus and response selections within the project file resource areas acts as QC, creating increased standardization and consistency statewide.

The system of checks built into the system includes error messages and a hard stop of the project if a peer review is required and not completed. Another safeguard of EnviroNet is “validation” which instigates a hard stop if required fields are not filled in the project file. There are security protocols to allow access to the appropriate staff for project file review and input, peer review and ultimately approval officials.

Legal Sufficiency Review

To date, ODOT has not applied the “ODOT NEPA Assignment Legal Sufficiency Review Guidance” guidance because it did not have any documents that required legal sufficiency review. There are no observations to report at this time.

Performance Measures

Observation 4: Some of ODOT’s performance measures are ineffective.

The ODOT developed Performance Measures as required in MOU Section 10.2 to provide an overall indication of ODOT’s execution of its responsibilities assigned by the MOU. The team urges ODOT to refine or revise performance measures to reveal any occasional or ongoing challenges in agency relationships as well as any possible need to adjust approaches to QC.

Training Program

The ODOT has a robust environmental training program and provides adequate budget and time for staff to access a variety of internal and external training. The ODOT updated its training plan in January 2017, and provided the plan to FHWA and resource agencies for their review, as required by Section 12.2 of the MOU. The training plan includes both traditional, instructor-based training courses and quarterly DEC meetings as well as monthly NEPA chats, where ODOT Central Office staff can share new information and guidance with district staff, including interactive discussions on the environmental program. Furthermore, the training plan includes a system to track training needs within ODOT. In addition, ODOT holds bi-annual meetings with consultants to provide on-going updates about the environmental program

Successful Practice 3: ODOT continues the practice of required and continuous training of both staff and consultants involved in the environmental process.

The ODOT’s training plan states that all ODOT environmental staff (both central and district offices) and environmental consultants are required to take the pre-qualification

training courses. Staff is also encouraged to take training offered beyond the minimum required training. All staff interviewed indicated that ODOT management fully supports required training of staff and consultants.

Observation 5: Opportunities exist for expanding training in Environmental Justice (EJ).

Currently, ODOT's training plan does not include a stand-alone training course on EJ. In the Self-Assessment summary report, ODOT identified EJ as an area needing improvement. This observation and that the team found project level compliance issues related to EJ indicate that additional attention should be paid by ODOT to EJ compliance. The FHWA encourages ODOT to include specific EJ training opportunities in its training plan, such as the Web-based course currently under development, and other EJ courses offered by the National Highway Institute (NHI), the FHWA Resource Center, and/or the EPA.

Next Steps

The FHWA provided a draft of this audit report to ODOT for a 14-day review and comment period and considered ODOT's comments in developing this draft report. In addition, FHWA will consider comments on the draft report received from the public within the 30-day comment period after publication in the Federal Register, pursuant to 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted, pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the Federal Register.

The FHWA will consider the results of this audit in preparing the scope of the next annual audit. The next audit report will include a summary that describes the status of ODOT's corrective and other actions taken in response to this audit's conclusions.

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